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"Off with His ___": Analyzing the Sex Disparity in Chemical Castration Sentences

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“OFF WITH HIS _____”: ANALYZING THE
SEX DISPARITY IN CHEMICAL
CASTRATION SENTENCES

*Zachary Edmonds Oswald**

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INTRODUCTION

Societies around the world have performed castration, in its various forms, on their male and female members for thousands of years, for numerous reasons.¹ Even within the United States, prisoners have been sentenced to castration (as a form of punishment or crime prevention) since the early twentieth century.² In recent years, legislatures have perpetuated this practice but with a modern twist. Now, states use chemical injections to castrate their inmates.

Legislatures likely passed chemical castration laws because the chemical injections were meant to avoid many of the adverse consequences of

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- 1. See Kimberly A. Peters, *Chemical Castration: An Alternative to Incarceration*, 31 DUQ. L. REV. 307, 308 (1993) ("In the Middle Ages, individuals were castrated as a punishment according to the *lex talionis*, i.e., 'an eye for an eye, a tooth for a tooth.' In Greece, slaves were castrated for commercial purposes and harem guards in the Middle East were castrated to prevent them from self-indulgence."); Stacy Russell, *Castration of Repeat Sexual Offenders: An International Comparative Analysis*, 19 HOUS. J. INT'L L. 425, 438–39 (1997) ("In ancient times, the Greeks castrated slaves for commercial purposes. Additionally, Harem guards in the Middle East and Orient were castrated to prevent guards from self-indulgence. Conquering armies would often castrate the captives of their enemy.").
 - 2. See, e.g., Robert J. Cynkar, *Buck v. Bell: "Felt Necessities" v. Fundamental Values?*, 81 COLUM. L. REV. 1418, 1433 (1981) ("By 1925, twenty-three states had passed at least one eugenical sterilization law. Each state combined the punitive, eugenic, and therapeutic motives of sterilization differently, and therefore declared different classes of people subject to each law. For example, the state of Washington passed a sterilization statute in 1909 primarily for punitive reasons, with habitual criminals and rapists the main targets of the law."); see also 49 AM. JUR. 3d 101 *Proof of Facts* § 6 (2011).

surgical castration while achieving many of its benefits.³ These laws also allowed legislators to be viewed as "tough on crime" and respond to public outcry over lenient sentences.⁴ Overall, the general public seemingly became enthralled with the belief that modern medicine provided the answer to the problem of sex crimes and sex criminals.⁵

It turns out, however, that systemic problems plague the chemical castration sentencing regime. These problems arise from the nature of the crimes eligible for chemical castration sentences, the manner of prosecution

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3. See Lystra Batchoo, *Voluntary Surgical Castration of Sex Offenders: Waiving the Eighth Amendment Protection from Cruel and Unusual Punishment*, 72 BROOK. L. REV. 689, 709 ("[A] court would find surgical castration to be excessive compared to what is necessary for the state to accomplish its goals. Certainly, protecting children and deterring sex offender activity are legitimate state aims. But surgical castration would fail this test since there are less intrusive and traditionally accepted punishment alternatives available, such as imprisonment and therapy. There are also innovative methods that are available or being tested that are less intrusive than surgical castration, such as chemical castration"); Kristin Carlson, Commentary, *Strong Medicine: Toward Effective Sentencing of Child Pornography Offenders*, 109 MICH. L. REV. FIRST IMPRESSIONS 27, 32 (2010), <http://www.michiganlawreview.org/assets/fi/109/carlson.pdf> ("[C]hemical castration is the most effective and least intrusive method of treating criminal pedophiles. It is clearly less intrusive than surgical castration or a lifetime of incarceration.").
 4. See Drummond Ayres, Jr., *California Child Molesters Face 'Chemical Castration'*, N.Y. TIMES, August 27, 1996, <http://www.nytimes.com/1996/08/27/us/california-child-molesters-face-chemical-castration.html?src=pm> ("[L]egal experts say [chemical castration] will be the most punitive child molestation measure ever adopted in this country."); *Inside America's Prisons*, LE MAGAZINE, August 2004, available at <http://www.november.org/stayinfo/breaking2/LEMagazine.html> ("Federal and state lawmakers responded to their constituents' outcry by drastically lengthening prison sentences, eliminating the discretion of judges to give lenient sentences when warranted, and appointing judges who were known to be very tough on crime. In fact, being 'tough on crime' became a prerequisite for legislators and governors to be elected and for judges to be appointed.").
 5. See, e.g., Eliza Shapiro, *Can Science Spot a Pedophile? Research Zeroes In On Brain Abnormalities*, DAILY BEAST, (Oct. 19, 2012, 4:45 AM), <http://www.thedailybeast.com/articles/2012/10/19/can-science-spot-a-pedophile-research-zeroes-in-on-brain-abnormalities.html> ("[M]any experts say [pedophilia] is a mental illness and, just like clinical depression or bipolar disorder, can be treated—and maybe one day cured. . . . Medications such as Depo-Provera . . . are being tested as effective 'chemical-castration' treatments, and some say cures, to pedophilia."); see also Charles L. Scott & Trent Holmberg, *Castration of Sex Offenders: Prisoners' Rights Versus Public Safety*, 31 J. AM. ACAD. PSYCHIATRY L. 502, 503 (2003) ("The magnitude of this problem combined with well-publicized sex crimes has increased society's awareness regarding potential dangers posed by sex offenders. The resulting community outcry has led to the passage of legislation requiring sex offender registration, mandatory community notification, civil commitment of sexually violent predators, and, more recently, castration statutes that include both chemical and surgical treatment options.").

of the criminals, and the exercise of judicial discretion when selecting the sentence. Therefore, the public, the government, and the criminals themselves have each contributed to the chemical castration sentencing regime's single greatest flaw: the punishment of chemical castration is, in effect, reserved exclusively for use against male offenders.

This Note, broken into six parts, discusses the disparate impact of the current chemical castration regime on male offenders and provides insight into why and how the system must change to eliminate or reduce this disparity. To set the stage, Part II provides the reader with background information about castration in general, such as the definitions that apply and the techniques that are used to achieve its different purposes. Next, Part III discusses the legal status of castration in the United States and around the world and the underlying motivation for these laws. Despite the recent popularity of chemical castration, Part IV argues that the government's adoption of chemical castration laws is not justified and reveals how various aspects of the chemical castration sentencing regime have created a perfect storm, which has led to the present sex disparity.

To combat this sex disparity, Part V sets forth various proposals that the government can implement into the current chemical castration sentencing regime. First, it provides two means that can be effectuated by the courts – declaring it unconstitutional or exercising judicial activism – which would cause the practice to cease altogether and thereby completely eliminate the disparity. Second, this section proposes changes that each branch of government could adopt to either reduce the sex disparity itself or eliminate the government's contribution to its presence. Finally, Part VI concludes that society must determine whether the sex disparity in the chemical castration sentencing context is unacceptable and, if so, which course of action would best eliminate or reduce that disparity.

I. BACKGROUND OF CASTRATION

A state can castrate its citizens using one of two methods: surgical castration or chemical castration. Each achieves different physical and psychological results and is thus only justifiable in certain situations.

A. Surgical Castration

Surgical castration necessarily differs between women and men. Surgical castration is achieved, in women, by “removal of [the] Fallopian tube

and the ovaries"; this is called an oophorectomy.⁶ Female surgical castration is an intricate procedure that has a relatively high complication rate during surgery.⁷ Following the procedure, the woman needs four to six weeks to recover before returning to normal daily activities.⁸ Surgical castration is achieved, in men, by removal of the testicles.⁹ By contrast to female surgical castration, male surgical castration is a relatively simple procedure and most men typically return to normal activities as soon as possible after the surgery.¹⁰

Surgical castration is a highly effective means for achieving several purposes of castration laws. Most importantly, it achieves the goals of sterilization and, in men, reduction in sex drive.¹¹ It also serves a strong punitive function because it involves invasive procedures (physical removal of internal organs) that involve painful and lengthy recovery.¹²

However, surgical castration entails some adverse consequences that do not further the goals of sentencing and, therefore, may not be the preferred form of punishment in certain situations or when applied to particular offenders.¹³ One of the most notable adverse effects of this procedure is that it renders both men and women completely and irreversibly infertile.¹⁴ In addition to this infertility, castrated males often lose the ability to achieve an erection and experience a loss of sexual desire.¹⁵ This consequence is excessive, for example, because if a sex offender is castrated, then he or she is unable to have ordinary sexual contact with a consenting adult partner—which goes beyond the desired effect. Castrated males also experience an inability to grow facial and pubic hair, loss of muscle mass and strength, laziness, higher-pitched voice, and the inability to produce male hor-

6. 49 AM. JUR. 3d 101 *supra* note 2, at § 4; *Ovarian Cancer: Detailed Guide* AM. CANCER SOC'Y (Oct. 5, 2012), *available at* <http://www.cancer.org/cancer/ovariancancer/detailedguide/index>.

7. 49 AM. JUR. 3d 101 *supra* note 2, at § 4; *see* Richard R. Love & John Phillips, *Oophorectomy for Breast Cancer: History Revisited*, 94.19 J. NAT'L CANCER INST. 1433 (2002).

8. *MDGuidelines: Oophorectomy*, MED. DISABILITY ADVISOR (5th Ed. 2012), *available at* <http://www.mdguidelines.com/easyaccess/oophorectomy>.

9. *See* 49 AM. JUR. 3d 101 *supra* note 2, at § 5.

10. *See MDGuidelines: Orchiectomy*, MED. DISABILITY ADVISOR (5th Ed. 2012), *available at* <http://www.mdguidelines.com/orchiectomy>.

11. *See* 49 AM. JUR. 3d 101 *supra* note 2, at §§ 4–5.

12. John F. Stinneford, *Incapacitation Through Maiming: Chemical Castration, the Eighth Amendment, and the Denial of Human Dignity*, 3 ST. THOMAS L.J. 559, 595–98 (2006).

13. *See* 49 AM. JUR. 3d 101 *supra* note 2, at § 5.

14. *Id.* at § 4–5.

15. *Id.* at § 5.

mones.¹⁶ Furthermore, for both sexes, castration results in the symbolic loss of manhood or womanhood;¹⁷ surgical castration has a noticeable stigmatic value that arguably dehumanizes the convicts.¹⁸ It is for the above reasons that states sought alternatives¹⁹ to surgical castration, such as chemical castration, which are designed to provide tailored forms of punishment for offenders.²⁰

B. Chemical Castration

Chemical castration is somewhat of a misnomer because it does not actually involve removing the person's uterus or testes.²¹ Instead, the state alters the offender's physiology through weekly chemical injections of a drug called Depo-Provera²²—which was originally created as a form of female birth control.²³ This procedure is meant to achieve many of the same goals as surgical castration but has been hailed as less invasive and more specifically tailored to achieving those goals.²⁴ In *People v. Clotfelter*, the

16. *Id.*

17. Madison Park, *Using Chemical Castration to Punish Child Sex Crimes*, CNN, Sept. 5, 2012, available at <http://www.cnn.com/2012/09/05/health/chemical-castration-science/index.html> ("In a way, I liken it to cutting the hand off the thief . . . It's very symbolic.").

18. Stinneford, *supra* note 12, at 595–98; Marques P. Richeson, *Sex, Drugs, and . . . Race-to-Castrate: A Black Box Warning of Chemical Castration's Potential Racial Side Effects*, 25 HARV. BLACK LETTER L.J. 95, 123 (2009).

19. Strictly speaking, although it is not castration, female offenders can also be surgically sterilized through "removal of the uterus (hysterectomy) . . . [or] blocking of the Fallopian tubes (tubal ligation)," and male offenders can be surgically sterilized through a vasectomy. 49 AM. JUR. 3d 101 *supra* note 11, at § 4–5. Therefore, these procedures can achieve the sterilization goals of some castration laws, but will not reduce the convict's ability or desire to have sex.

20. See Raymond A. Lombardo, *California's Unconstitutional Punishment for Heinous Crimes: Chemical Castration of Sexual Offenders*, 65 FORDHAM L. REV. 2611, 2643 (1997); see also Karen Harrison, *Legal and Ethical Issues when Using Antiandrogenic Pharmacotherapy with Sex Offenders*, 3 SEXUAL OFFENDER TREATMENT 2 (2008) ("Rather than using the irreversible and arguably barbaric option of surgical castration; antiandrogenic pharmacotherapy achieves the same results, but through less invasive and permanent means.").

21. Kristin Carlson, *Strong Medicine: Toward Effective Sentencing of Child Pornography Offenders*, 109 MICH. L. REV. FIRST IMPRESSIONS 27, 31 (2010).

22. Larry Helm Spalding, *Florida's 1997 Chemical Castration Law: A Return to the Dark Ages*, 25 FLA. ST. U. L. REV. 117, 139 n. 127 (1998).

23. Depo-Provera, produced by the Pharmacia & Upjohn Company, is the trade name of medroxyprogesterone acetate (also known as MPA). Linda Beckman, *Chemical Castration: Constitutional Issues of Due Process, Equal Protection, and Cruel and Unusual Punishment*, 100 W. VA. L. REV. 853, 856–57 (1998). For an explanation of what those goals include, see *infra* Section III(a).

24. See Harrison, *supra* note 20. See also *infra* Part III.

California Superior Court "concluded chemical castration was a less severe alternative [to surgical castration]" for a child molester's sentence.²⁵ As a result, chemical castration has gained popularity over surgical castration in modern discourse.²⁶

The effectiveness of chemical castration at achieving goals of criminal sentencing depends on the attributes of the particular convict, including, in part, whether the offender is male or female. There are significant side effects similarly endured by both men and women undergoing Depo-Provera injections.²⁷ Some of the side effects in men include "impotence, abnormal sperm, lowered ejaculatory volume, loss of body hair and shrinkage of the prostate and seminal vessels."²⁸ Women may be exposed to an increased risk of "irregular menstrual bleeding, increased risk of osteoporosis, slightly increased risk of developing breast cancer, and an increased risk of developing blood clots and stroke."²⁹ By reducing testosterone production and consequently the offender's sex drive, however, chemical castration injections significantly reduce recidivism rates in certain male offenders.³⁰ In addition, even with a reduced sex drive, the drug does not absolutely prevent all male offenders from engaging in undesirable sexual activity.³¹ Moreover, while chemical castration does render women infertile, the same reduction in recidivism has not been found in most female offenders.³² The fact that the Depo-Provera injections achieve different results (depending on whether the

25. *People v. Clotfelter*, 2002 WL 31116970 at *4 (Cal. Dist. Court. App. 2002).

26. Roslyn Myers, *Medicalization of Punishment as Prevention*, 4 SEX OFFENDER L. REPORT 51, 52, 58–59 (2003) ("In response to an online poll asking if convicted rapists should be castrated using chemical castration . . . [f]ifty-five percent supported its use at a judge's discretion. Thirty-three percent said that they preferred to see surgical castration used.").

27. Although some of the long-term effects have not been adequately determined, many of the short-term side effects have been well documented. Compare Beckman, *supra* note 23, at 865 ("[L]ong-term effects are unknown due to a lack of long-term studies conducted with MPA."), with Stinneford, *supra* note 12, at 568 ("[L]ong-term MPA treatment depletes bone mineral density, so that offenders appear likely to experience osteoporosis and multiple bone fractures as a result of their treatment").

28. Richeson, *supra* note 18, at 122.

29. Beckman, *supra* note 23, at 857, 860.

30. *Id.* at 860 (describing the effectiveness of chemical castration when imposed on males who suffer from paraphilia as compared to those who do not suffer from that disease). See also Part IV(a)(i).

31. *Id.* at 863–64.

32. See generally Beckman, *supra* note 23, at 857–58 ("Most importantly, however, only one to five percent of over 3,900 women in a clinical trial using MPA reported experiencing decreased libido or anorgasmia."); Note, *Constitutional Law—Due Process and Equal Protection—California Becomes First State to Require Chemical Castration of Certain Sex Offenders*, 110 HARV. L. REV. 799, 800 (1997).

offender is male or female) is just one flaw in the chemical castration sentencing regime.

The real disparity results from problematic structural processes involved in selecting *who* to sentence. These processes have the effect of exempting women from receiving chemical castration sentences. This will be discussed more in Section IV, but first, Section III will provide context as to why these sentences are being imposed and demonstrate the rising popularity of the laws authorizing chemical castration sentences.

II. THE BURGEONING POPULARITY OF CHEMICAL CASTRATION LAWS

This Section demonstrates that, while originally society believed chemical castration laws would achieve a laudable purpose—punishing heinous criminal offenders in an effective and appropriate manner—this belief was not based on rational policy considerations. Instead, the laws were passed as the result of the general public becoming enthralled with the idea that modern medicine could provide a “magic cure”³³ for sex offenders. Additionally, these laws coincided with the modern “trend toward more severe sentencing, [which] is probably influenced by the media’s method of reporting crime and the emphasis given to its increase, as well as by the call for law and order that has underlined the campaign rhetoric of some candidates for political office.”³⁴ Consequently, this public enthusiasm manifested itself, within the U.S. and around the world, in the form of an imbalanced chemical castration sentencing regime, which is inherently biased against male offenders.

A. *The Willingness to Adopt Chemical Castration Laws*

Chemical castration sentences are reserved for criminals who commit heinous crimes such as rape, child molestation, lewd, or lascivious acts.³⁵ There are four explanations for why legislatures provided chemical castration as an available form of punishment for these offenders—it can be used for any or all of the following: a method of sterilization,³⁶ a means of reduc-

33. *Id.* at 860 (claiming that, in fact, chemical castration “is not a magic cure for paraphilia”).

34. 34 AM. JUR. 1 *Trials* § 18 (2010); see e.g., Nannette Miranda, *Bill Proposed to Get Tough on Sex Offenders*, ABC NEWS, April 12, 2010, <http://abclocal.go.com/kgol/story?section=news/politics&cid=7382201>; see also John Matthew Fabian & Ian Friedman, *Getting Tough on Sex Offenders: The Adam Walsh Act & Ohio SB 10*, available at http://johnmatthewfabian.com/wp-content/uploads/2011/11/Adam_Walsh_Act.pdf.

35. Spalding, *supra* note 22, at 118; Beckman, *supra* note 23, at 854.

36. Sterilization is defined as “[t]he act of making (a person or other living thing) permanently unable to reproduce.” BLACK’S LAW DICTIONARY (9th ed. 2009). For a non-

ing the offender’s sexual libido,³⁷ a punitive form of punishment,³⁸ and a treatment for certain medical conditions.³⁹ Therefore, it is plausible that

comprehensive list of state laws that allow sterilization of prisoners, *see* ARK. CODE ANN. §§ 20-49-201–207 (2011); COLO. REV. STAT. ANN. §§ 27-10.5-128–131 (2011); CONN. GEN. STAT. ANN. §§ 45a-691–700 (2011); DEL. CODE ANN. tit. 16, §§ 5702–5716 (2011); GA. CODE ANN. §§ 31-20-1–6 (2011); HAW. REV. STAT. ANN. §§ 560:5-601–612 (2011); IDAHO CODE §§ 39-3901–39-3910 (2011); ME. REV. STAT. ANN. §§ 34-193-2461–2468 (2011); N.J. STAT. ANN. § 30:6D-5 (2011); OHIO REV. CODE ANN. § 5123.86 (2011); ORE. REV. STAT. §§ 436.205–335 (2011); UTAH CODE ANN. §§ 62A-6-101–116 (2011); VT. STAT. ANN. tit. 18, §§ 8705–8716 (2011); VA. CODE ANN. §§ 54.1.2974–2980 (2011); W. VA. CODE §§ 27-16-1–5 (2011).

37. *See* Russell, *supra* note 1, at 436 (“Chemical castration is used to reduce sexual urges.”). This is premised on the belief that, if the offender’s libido and sexual compulsion are diminished, the offender will no longer pose a threat to society. Thus, the purpose of reducing the offender’s libido is achieved by literally cutting off the source of the problem. Beckman, *supra* note 23, at 863.
38. Mutilating the offender’s genitals, without intending to achieve anything further, is similar to the historic practices of branding and cutting off ears, which have symbolic significance but very little, if any, practical value. On this practice, *see* Strinneford, *supra* note 12, at 594. Castration can be used to demonstrate society’s condemnation of criminal behavior because it is a gruesome and degrading form of punishment, even if performed in a professional and medically sterile manner. Kenneth B. Fromson, *Beyond an Eye for an Eye: Castration as an Alternative Sentencing Measure*, 11 N.Y.L. SCH. J. HUM. RTS. 311, 323 (1994) (“[A]s a punishment, it serves as a device for the expression of feelings of resentment, indignation, and vindication.”) (internal quotation marks omitted).
39. Surgical castration has been used as a form of medical treatment for non-criminal and criminal patients alike. Marnie E. Rice & Grant T. Harris, *Is Androgen Deprivation Therapy Effective in the Treatment of Sex Offenders?*, 17 PSYCHOL. PUB. POL’Y & L. 315, 320 (2011) (“Androgen-deprivation therapy via surgical or chemical castration is the most common medical treatment for advanced prostate cancer.”). Therefore, a state may order a prisoner to undergo castration if it is medically necessary; however, a state may refuse to characterize castration as medically necessary when it is requested to “cure” a convict of his sexual impulses because these urges are not recognized as a physical or mental illness. Stacy Russell, *supra* note 1, at 430 (discussing a Washington court’s denial of a request from a convicted child molester to allow him to be surgically castrated because the procedure was not “medically necessary”).

chemical castration has the ability to satisfy all four goals of criminal punishment: retribution,⁴⁰ deterrence,⁴¹ incapacitation,⁴² and rehabilitation.^{43,44}

Furthermore, some scholars have argued that even if these goals are not achieved for every offender subjected to chemical castration, it is still better than the only realistic alternative: prison.⁴⁵ This view is based on concerns regarding prison overcrowding in recent years and the notion that incarceration is an imperfect solution because most sex offenders will even-

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40. Retribution is "based on the notion that punishment is just when it restores the moral balance that criminal behavior upsets." Nora Demleiter et al., SENTENCING LAW AND POLICY: CASES, STATUTES AND GUIDELINES 2 (2d ed. 2007). A sentence should be tailored "to reflect the seriousness of the offense, to promote respect for the law, and to provide just punishment for the offense." 18 U.S.C. § 3553(a)(2)(A) (2010).
 41. Deterrence is achieved when a sentence sends a message to both the convict and the population at large that engaging in particular criminal activity will result in a certain penalty, discouraging would-be criminals from going forward with the conduct. Meghan J. Ryan, *Judging Cruelty*, 44 U.C. DAVIS L. REV. 81, 108 (2010). The punishment should "afford adequate deterrence to criminal conduct." 18 U.S.C. § 3553(a)(2)(B) (2010).
 42. The traditional means of incapacitating a convict is through incarceration – a convict is unable to commit crimes against the general public while he is locked up in prison. See Carlson, *supra* note 21, at 27. The sentence should "protect the public from further crimes of the defendant." 18 U.S.C. § 3553(a)(2)(C) (2010). Evidence suggests chemical castration does nothing to incapacitate female offenders. Although it may incapacitate some male offenders, others may still be able to commit sex crimes, engage in sexual activity, and counteract the effectiveness of the chemical castration injections by (illegally) ingesting testosterone supplements. Beckman, *supra* note 23, at 871, 874; Russell, *supra* note 1, at 438.
 43. The epitome of rehabilitation occurs when an offender is reintegrated back into society as a citizen who is willing and able to abide by its norms. Accordingly, the punishment should "provide the defendant with needed educational or vocational training, medical care, or other correctional treatment in the most effective manner." 18 U.S.C. § 3553(a)(2)(D) (2010). Although optimistic, it is possible that chemical castration sentences "diminish a paraphilic's sexual compulsions" and thereby enable the offender to become a normally functioning member of society. Beckman, *supra* note 23, at 863.
 44. Federal courts are mandated to consider these factors after calculating a sentence under the Federal Sentencing Guidelines, as codified in 18 U.S.C. § 3553(a). See Benjamin J. Priester, *Apprendi Land Becomes Bizarro World: 'Policy Nullification' and Other Surreal Doctrines in the New Constitutional Law of Sentencing*, 51 SANTA CLARA L. REV. 1, 22–23 (2011).
 45. E.g., Carlson, *supra* note 21, at 32–33; *contra* Comment, *California is on the "Cutting Edge": Hormonal Therapy (A.K.A. "Chemical Castration") is Mandated for Two-Time Child Molesters*, 14 T.M. COOLEY L. REV. 351, 370 (1997). See also Matthew V. Daley, *A Flawed Solution to the Sex Offender Situation in the United States: The Legality of Chemical Castration for Sex Offenders*, 5 IND. HEALTH L. REV. 87, 88 (2008) (listing states that have turned to chemical castration in response to over-incarceration).

tually be released from prison.⁴⁶ With nearly 90,000 violent sex offenders in the state and federal prison systems during the 1990's (when chemical castration laws were first passed),⁴⁷ legislators were supposedly left with no choice but to enact chemical castration laws.⁴⁸ Prison overcrowding continues to be a problem today,⁴⁹ as more states consider adopting chemical castration laws of their own. There is some evidence that chemical castration could be a cheaper solution than increased prison sentences.⁵⁰ The claim that chemical castration would save the state money likely added to its appeal to legislators.

Implementation of chemical castration laws also allowed decision-makers to pander to the public outcry for harsher sentences for sex offenders.⁵¹ The mother of a serial rapist's victim perfectly encapsulated this public

46. Richeson, *supra* note 18, at 100; Russell, *supra* note 37, at 434.

47. Lawrence A. Greenfeld, *Sex Offenses and Offenders: An Analysis of Data on Rape and Sexual Assault*, BUREAU OF JUSTICE STATISTICS (1997) ("Among 906,000 offenders confined in State prisons in 1994, 88,000, or 9.7%, were violent sex offenders.").

48. In fact, several (possibly ineffective) alternatives to imposing chemical castration and increased prison sentences exist: offenders could be provided with psychiatric counseling (however, most offenders do not attend these sessions after they have been released from prison); or public notification programs, such as sex registries, could be used (however, these do not adequately prevent, deter or incapacitate the offenders from committing the crime). See Russell, *supra* note 1, at 434; see also Roger N. Lancaster, *Sex Offenders: The Last Pariahs*, N.Y. TIMES, Aug. 20, 2011, available at <http://www.nytimes.com/2011/08/21/opinion/sunday/sex-offenders-the-last-pariahs.html?pagewanted=all&r=0>.

49. See, e.g., Martinez, *Jail Population Swells As A Result Of State Prison Transfer*, BAY CITY NEWS SERVICE (Feb. 17, 2012), <http://martinez.patch.com/articles/martinez-jail-population-swells-as-a-result-of-state-prison-transfer>; *Lafourche Home-Jailing Program May be Tweaked*, DAILYCOMET.COM (Feb. 25, 2012, 7:25 PM), <http://www.dailycomet.com/article/20120225/HURBLOG/120229743/1223?Title=Lafourche-home-jailing-program-may-be-tweaked> (considering new home-monitoring program for non-sex-offenders). See also MISSING CHILD CLEARING-HOUSE PROGRAM, NAT'L CTR. FOR MISSING AND EXPLOITED CHILDREN, available at http://us.missingkids.com/missingkids/servlet/ServiceServlet?LanguageCountry=en_US&PageId=1421. See generally Jesselyn McCurdy, *Federal Prisons Busting at the Seams: Sentencing Commission Should Prioritize Growing Prison Population*, ACLU, July 31, 2012, available at <http://www.aclu.org/blog/criminal-law-reform/federal-prisons-busting-seams-sentencing-commission-should-prioritize>.

50. Nicolas Wahl, *Voluntary chemical castration could slice the cost of criminal rehabilitation*, THE COLLEGIAN, Sept. 24, 2012 ("[I]t costs \$44,000 to house a general population inmate in the New Jersey prison system. The cost of a year's supply of the testosterone-lowering drug Depo-Lupron? A little over \$9,000 a year. Financially, this method seems to make sense . . ."); *contra* Daley, *supra* note 45, at 88 (arguing that it is actually more expensive to enforce chemical castration regimens than merely keep the convict in prison).

51. See, e.g., Online Petition, *Harsher Punishments For Sexual Offenders*, <http://www.petitiononline.com/60364243/petition.html>; Terry Moran and Hanna Siegel, *The Fight*

sentiment when she said: "People say it is barbaric to do this, to chemically castrate them. It is barbaric that a man goes to prison, gets out, and commits the same crime all over again."⁵² The desire to punish sex offenders was similarly expressed by Louisiana Governor Bobby Jindal, when immediately after signing the Sex Offender Chemical Castration Bill in 2008, he said:

I want to send the message loud and clear – to the Supreme Court of the United States and beyond – make no mistake about it, if anyone wants to molest children and commit sexual assaults on kids they should not do so here in Louisiana. Here, we will do everything in our power to protect our children [including sentencing offenders to chemical castration] and we will not rest until justice is won and we have fully punished those who harm them.⁵³

This is precisely the type of decision-making—motivated by passion rather than reason—that led to the current problems in the chemical castration sentencing regime.

Even some sex offenders have argued in favor of castration. Despite the stigma, pain, and risks involved, some criminal convicts have requested to be surgically castrated.⁵⁴ In one case, a man convicted of child molestation went so far as to castrate himself to end his sexual desires.⁵⁵ These convicts are willing to undergo the procedure even though, in these specific cases, it would in no way shorten their current prison sentence, because they believe castration will put an end to their sexual desires and fantasies and prevent them from being sent back to prison in the future.⁵⁶

Against Sex Offenders, ABC WORLD NEWS (Mar. 2, 2010), <http://abcnews.go.com/WN/fight-sex-offenders/story?id=9991709#TyxholxrOSo>; Mike Gregg, *Viewpoint-Repeat Sex Offenders Need Harsher Punishments*, SEX OFFENDER ISSUES (Mar. 23, 2007), <http://sexoffenderissues.blogspot.com/2007/03/viewpoint-repeat-sex-offenders-need.html>; David Schwartz, *Sex Offenders Need Harsher Sentences*, Letter to the Editor, ONEIDA DAILY DISPATCH (Aug. 18, 2010), available at <http://www.oneida.dispatch.com/articles/2010/08/18/opinion/doc4c6c9bc3424b2418334408.txt>. See generally *Sex laws: Unjust and Ineffective*, THE ECONOMIST, Aug. 6, 2009.

52. Russell, *supra* note 37, at 456–57 (quoting *Morning Edition: Florida Has More Violent Crimes than Any Other State*, National Public Radio (Mar. 7, 1994)).

53. Susan Duclos, *Louisiana Governor Bobby Jindal Signs Sex Offender Chemical Castration Bill*, DIGITAL JOURNAL (June 26, 2008), <http://digitaljournal.com/article/256607>.

54. Russell, *supra* note 37, at 428.

55. Candace Rondeaux, *Can Castration Be a Solution for Sex Offenders?*, WASHINGTON POST, July 5, 2006, at B01.

56. Russell, *supra* note 1, at 428–29.

It is not surprising, taking into consideration the outcry from the public, politicians, and offenders themselves, that policy-makers would forgo certain liberties and procedural protections when dealing with crimes such as rape and child molestation.⁵⁷ These factors likely continue to motivate recent proposals for chemical castration legislation. However, as discussed further below, these concerns should not override problems plaguing the current chemical castration sentencing regime and the sex disparity it creates.

B. In the United States

Chemical castration has gained increasing popularity within the United States. Although surgical castration has been performed on prisoners in the United States as early as 1899,⁵⁸ California was the first state to enact chemical castration legislation, almost one hundred years later, on September 17, 1996.⁵⁹ Now, several states, including California,⁶⁰ Montana,⁶¹ Florida,⁶² Louisiana,⁶³ Iowa,⁶⁴ and Wisconsin⁶⁵ "allow a judge to *force* a sex offender to undergo chemical castration."⁶⁶ Although Georgia⁶⁷ and Oregon⁶⁸ once allowed chemical castration, these laws have since been repealed. Uniquely, Texas "gives the offender the decision to undergo voluntary surgical castration as a condition of release [but] does not [make the same] offer [for] chemical castration."⁶⁹ Chemical castration legislation has been pro-

57. See Part IV.

58. Russell, *supra* note 1, at 440; see also Charles L. Scott & Trent Holmberg, *Castration of Sex Offenders: Prisoners' Rights Versus Public Safety*, 31 J. AM. ACAD. PSYCHIATRY L. 502, 502 (2003) ("During the late 1800s, Dr. Harry Sharp of Indiana surgically castrated nearly 180 male prisoners for the purpose of reducing their sexual urges. As a result of his efforts, Indiana began using physical castration to decrease recidivism of certain prisoners and became the first state to legalize the sterilization of 'mental defectives.'").

59. Recent Legislation, *Constitutional Law—Due Process and Equal Protection—California Becomes First State to Require Chemical Castration of Certain Sex Offenders*, 110 HARV. L. REV. 799, 799 (1997).

60. CAL. PENAL CODE § 645 (2001) (effective Jan. 1, 2002).

61. MONT. CODE ANN. § 45-5-512 (2007).

62. FLA. STAT. § 794.0235 (1997).

63. LA. REV. STAT. ANN. § 15:538(C)(2)(b) (2009) (effective Sept. 1, 2009).

64. IOWA CODE § 903B.10 (2005).

65. WIS. STAT. § 304.06(1q) (2011).

66. Jeff Simons, *The Availability of Chemical Castration to Control Sex Drive*, 33 CHAM-PION 26, 27 (2009) (emphasis in original).

67. GA. CODE ANN. § 42-9-44.2 (2011).

68. OR. REV. STAT. §§ 144.625-29 (2011).

69. Elizabeth M. Tullio, *Chemical Castration for Child Predators: Practical, Effective, and Constitutional*, 13 CHAP. L. REV. 191, 207 (2009). See also TEX. GOV'T. CODE ANN. § 508.226 (2001).

posed but not yet adopted in Pennsylvania (1997),⁷⁰ Oklahoma (2002),⁷¹ Minnesota (2005),⁷² Vermont (2008),⁷³ Alabama (2009),⁷⁴ and Virginia (2011).⁷⁵ This amounts to a total of at least sixteen states that have either proposed or adopted some type of chemical castration statute.

C. Around the World

The increasing popularity of chemical castration legislation around the world is likely to normalize these sentences in the United States, despite the sentencing regime's flaws. Although many European countries, including Denmark, Finland, Germany, Norway, and Sweden, have only enacted castration laws as treatment or punishment of sex offenders,⁷⁶ Poland was the first country in the European Union to impose chemical castration as a form of punishment, in 2010.⁷⁷

However, support for chemical castration is not limited to Europe. For example, the Australian Minister for Police and Emergency Services has ad-

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70. Robert Moran, *Legislature Studying Chemical Castration For Some Sex Offenders Several States Have Enacted Such Laws For Repeat Offenders. Only Volunteers Would Be Treated With Drugs*, PHILLY.COM (Nov. 19, 1997), http://articles.philly.com/1997-11-19/news/25544076_1_chemical-castration-offenders-sexual-desire; see also Michelle Cottle, *Penn State Sex-Abuse Case Revives Issue of Using Chemical Castration*, DAILY BEAST (Nov. 11, 2011, 4:45 AM), <http://www.thedailybeast.com/articles/2011/11/11/penn-state-sex-abuse-case-revives-issue-of-using-chemical-castration.html> (arguing for reconsidering the legislation in light of the recent Penn. State scandal involving Jerry Sandusky).
 71. Press Release, Oklahoma Senate Communications Division, *Sen. Shurden Urges Governor to Sign Castration Bill*, (June 3, 2002), available at http://www.oksenate.gov/news/press_releases/press_releases_2002/pr20020603.html.
 72. Laura McCallum, *Sex Offenders Face Life in Prison, Castration Under Bill*, MINNESOTA PUBLIC RADIO (Apr. 28, 2005), http://news.minnesota.publicradio.org/features/2005/04/28_mccalluml_publicsafety/.
 73. *Sex Slaying Sparks Vermont Pol Battle*, UPI.COM (July 15, 2008), http://www.upi.com/Top_News/2008/07/15/Sex-slaying-sparks-Vermont-pol-battle/UPI-14091216132957/.
 74. *Alabama Legislators Discussing Castration and Other Novel Punishments for Sex Offenders*, SENTENCING LAW & POL'Y (February 8, 2009), http://sentencing.typepad.com/sentencing_law_and_policy/2009/02/alabama-legislators-discussing-castration-and-other-novel-punishments-for-sex-offenders.html.
 75. Dena Potter, *Virginia State Senator Proposes Castrating Sex Offenders*, HUFFPOST POLITICS (Jan. 26, 2011, 6:39 AM), http://www.huffingtonpost.com/2011/01/26/virginia-sex-offenders-bill_n_814139.html.
 76. Russell, *supra* note 37, at 441.
 77. *Chemical castration in Poland*, THE ECONOMIST, June 10, 2010, available at http://www.economist.com/blogs/easternapproaches/2010/06/chemical_castration_poland; see also Charlotte Bailey, *Poland to Enforce Chemical Castration of Paedophiles*, THE TELEGRAPH, Sept. 26, 2008.

vocated for compulsory chemical castration of child molesters and rapists.⁷⁸ Similar legislation has been proposed in New Zealand.⁷⁹ Russia also recently enacted a law authorizing the use of chemical castration on child sex offenders.⁸⁰ Likewise, chemical castration laws have been enacted or proposed in non-Western societies (as recently as this year) in countries such as Taiwan⁸¹ and Turkey.⁸² Furthermore, an Indian judge recently "caused a storm . . . when she suggested castration as the most appropriate punishment for pedophiles and serial sex offenders."⁸³

III. SEX DISPARITY IN THE CHEMICAL CASTRATION SENTENCING REGIME

There are four components in the chemical castration sentencing regime that create a sex disparity in which males are sentenced to chemical castration more often than female offenders. First, chemical castration is only available for punishment of certain crimes. Second, males commit those crimes more frequently than females. Third, men are prosecuted for these crimes more often and more vigorously than women. And fourth, judges have been provided with unfettered discretion over when to impose the sentence of chemical castration, which has been exercised in a sex-biased manner. Despite its prevalence, the disparity created by these components has gone unaddressed for many years.

A. The Legislature: Male-Biased Crimes are Those Which are Eligible for Chemical Castration Sentences

Statutes authorizing the use of chemical castration at sentencing contribute to the sex disparity in one of two ways. First, a statute may be

78. Russell, *supra* note 37, at 435.

79. Richeson, *supra* note 18, at 97.

80. *Chemical Castration, Life Sentences: Russia's Duma Toughens Law Against Child Sex Offenders*, EPRESS (Feb. 8, 2012) ("The new law also envisages compulsory medical treatment such as chemical castration, as well as 15- to 20-year sentences for sexual crimes against children and a life sentence for repeated offenders or in cases where the victim is a child under the age of 12."), *available at* <http://www.epress.am/en/2012/02/08/chemical-castration-life-sentences-russias-duma-toughens-law-against-child-sex-offenders.html>.

81. *Taiwan Mulls Chemical Castration for Sex Offenders*, ASIA PAC. NEWS (Nov. 10, 2010, 7:29 PM), http://www.channelnewsasia.com/stories/afp_asiapacific/view/1092634/11.html.

82. Suzan Fraser, *Turkey Considers Chemical Castration for Rapists*, HUFFPOST WORLD (Feb. 10, 2011, 7:40 AM), http://www.huffingtonpost.com/2011/02/10/turkey-chemical-castration-rape_n_821202.html.

83. Rita Joseph, *Judge Calls for Chemical Castration*, UCA NEWS, Feb. 20, 2012, *available at* <http://www.ucanews.com/2012/02/20/judge-calls-for-chemical-castration/>.

facially discriminatory, i.e., making the criminal act by definition limited to being committed by males.⁸⁴ For an example regarding statutory rape, in *Michael M. v. Superior Court of Sonoma County*, the United States Supreme Court upheld a California statute which “define[d] unlawful sexual intercourse as an act of sexual intercourse accomplished with a female not the wife of the perpetrator, where the female [was] under the age of 18 years. The statute thus [made] men alone criminally liable for the act of sexual intercourse.”⁸⁵

Second, some statutes which, on their face, apply equally to both men and women, have been interpreted by courts to mean that only men can commit the offense.⁸⁶ In regard to one of these facially neutral statutes, one court concluded that “a female can only be the victim of rape, not the perpetrator . . . notwithstanding the . . . statute’s use of the term ‘person’ without distinction as to sex.”⁸⁷ This conclusion was reached as a result of the court’s assumption that only women can be physically raped, and that the “protection of females from rape is both a legitimate and essential legislative objective.”⁸⁸ At first glance this “as applied”⁸⁹ discrimination may seem like a justifiable premise that differentiates between males and females only as a result of the offender’s own characteristics; however, this reaction is misplaced. It is critical to remember that the previously cited cases were trying to decipher the legislative intent behind the statutes in accordance with normal statutory interpretation. Thus, the fact is that these statutes

84. See, e.g., *Liberta v. Kelly*, 839 F.2d 77, 83 (2d. Cir. 1988) (discussing whether a New York statute, Section 130.35, violated the Equal Protection Clause because it considered only males capable of committing rape).

85. *Michael M. v. Superior Court of Sonoma Cnty.*, 450 U.S. 464, 466 (1981) (internal quotes omitted).

86. State and federal cases in which the court upheld non-sex neutral, criminal statutes as not violating equal protection rights include *Country v. Parratt*, 684 F.2d 588, 593 (8th Cir. 1982); *Hall v. McKenzie*, 575 F.2d 481, 484–85 (4th Cir. 1978); *Moore v. Cowan*, 560 F.2d 1298, 1303 (6th Cir. 1977); *United States v. Davis*, 785 F.2d 610, 614 (8th Cir. 1986); *People v. Salinas*, 551 P.2d 703, 706 (Colo. 1976); *State v. Ewald*, 216 N.W.2d 213, 217–18 (Wis. 1974); *State v. Price*, 529 P.2d 85, 89 (Kan. 1974); *State v. Kelly*, 526 P.2d 720, 723 (Ariz. 1974); *Brooks v. State*, 330 A.2d 670, 672–73 (Md. 1975); *People v. Mackey*, 120 Cal. Rptr. 157, 160 (Cal. App. 1975); *People v. Medrano*, 321 N.E.2d 97, 98–99 (Ill. App. 1974).

87. *Brooks v. State*, 330 A.2d 670, 672 (Md. Ct. Spec. App. 1975) (citations omitted). See also Ronald V. Sinesio, Annotation, *Prosecution of Female as Principle for Rape*, 67 A.L.R. 4TH 1127 at § 4 (1989) (discussing the “[v]iew that females cannot be prosecuted for rape”).

88. *Brooks*, 330 A.2d at 673. See also Sinesio, *supra* note 87.

89. Alex Kreit, *Making Sense of Facial and As-Applied Challenges*, 18 WM. & MARY BILL RTS. J. 656, 657 (2009).

apply differently to men and women because of intentional decisions on the part of legislatures.⁹⁰

Therefore, as a result of the statutes themselves and judicial interpretation of legislative intent, the legislative branch's actions have created a nearly complete statutory bar against women being sentenced to chemical castration, even when they engage in the exact same conduct as men. Most shocking of all, perhaps, is the sheer number of examples of such discriminatory statutes, both facially and as applied.⁹¹

B. The Convicts: Men Commit the Crimes More Often

In the realm of sex crimes (to which chemical castration exclusively applies),⁹² the greatest sex disparity in criminal law exists: overwhelmingly, men constitute the offenders and women the victims.⁹³ According to one study, "[males] constitute the bulk of the general offender population, and this is truer for sex offending . . . For the years 1994 to mid-2005, 2.4 percent of sex offending cases handled by the prosecution service involved female defendants."⁹⁴ The study went on to say that instances of "[r]ape and sexual assault [by women offenders are] infrequent."⁹⁵ In fact, until recently,⁹⁶ under the FBI's definition, rape could only be committed by men.⁹⁷

90. *Marbury v. Madison*, 5 U.S. 137, 177–78 (1803) ("It is emphatically the province and duty of the [the judicial branch] to say what the law is.").

91. See, Donald T. Kramer, Annotation, *What Constitutes Reverse Sex or Gender Discrimination Against Males Violative of Federal Constitution or Statutes—Nonemployment Cases*, 166 A.L.R. FED. 1 at § 13(a) & (d) (discussing cases, for each circuit and state, that have held such statutes valid or invalid under the Fourteenth Amendment's Due Process Clause).

92. Spalding, *supra* note 22, at 118; Beckman, *supra* note 23, at 854.

93. Darrell Steffensmeier & Emilie Allan, *Gender and Crime: Toward a Gendered Theory of Female Offending*, 22 ANN. REV. SOC. 459, 470 (1996).

94. Catrien Bijleveld, *Sex Offenders and Sex Offending*, 35 CRIME & JUST. 319, 351 (2007) (discussing sex offenses committed by females in the Netherlands); *Female Sex Offenders*, CENTER FOR SEX OFFENDER MANAGEMENT (Mar. 2007), available at http://www.csom.org/pubs/female_sex_offenders_brief.pdf.

95. Bijleveld, *supra* note 94, at 351 (discussing sex offenses committed by females in the Netherlands); *Female Sex Offenders*, CTR. FOR SEX OFFENDER MANAGEMENT (March 2007), available at http://www.csom.org/pubs/female_sex_offenders_brief.pdf.

96. Amanda Terkel, *Eric Holder Expands FBI's Narrow, Outdated Definition of Rape*, THE HUFFINGTON POST (Jan. 6, 2012, 10:27 AM ET), http://www.huffingtonpost.com/2012/01/06/eric-holder-fbi-rape_n_1189145.html.

97. The FBI's Uniform Crime Reporting Program's definition of "Forcible Rape" is available at <http://www.fbi.gov/about-us/cjis/ucr/crime-in-the-u.s/2010/crime-in-the-u.s.-2010/violent-crime/rapemain> ("Forcible rape . . . is the carnal knowledge of a female forcibly and against her will.").

From arrest data from 9,511 law enforcement agencies across the US, the Department of Justice (2002) found 1.2% of perpetrators of forcible rape to be female; females committed 8% of sex offenses (excluding forcible rape, prostitution and commercialized vice), including statutory rape and offenses against chastity, common decency, morals, and attempts at such.⁹⁸

Many theories have been postulated—including genetics, culture, intimate relationship dynamics, and the influence of alcohol—yet, there is no clear consensus for why men commit sex crimes more frequently than women.⁹⁹

While part of the reason men constitute the vast majority of charged sex offenders is surely due to the fact that men actually commit the crimes more often, it may also be due, in part, to “possible discrimination in the police officer’s decision to arrest.”¹⁰⁰ Assuming this is true, the above statistics would be even further skewed, making the disparity even greater. Because these are the offenses that subject convicted offenders to chemical castration, there is a decreased likelihood that a woman would be subject to chemical castration.

*C. The Prosecutors: Men are Prosecuted More Often
and to a Harsher Degree*

Additionally, prosecutorial discretion may partially contribute to males being sentenced to chemical castration more frequently. Even when they do commit a sex crime, “women receive more lenient treatment because of judicial paternalism on the part of prosecutors.”¹⁰¹ Therefore, if a woman committed a specified crime that made her eligible for chemical

98. Susan McCarthy Strickland, *A Comparative Study of Female Sex Offenders and Female Offenders: Exploring Issues of Personality, Trauma, and Cognitive Distortions*, 30 (Dec. 2004) (unpublished Ph.D. dissertation, University of Georgia), available at http://athenaum.lib.uga.edu/bitstream/handle/10724/7844/strickland_susan_m_200412_phd.pdf?sequence=1.

99. Janet Meyer, COLORADO COALITION AGAINST SEXUAL ASSAULT, *Brief Summary of the Root Causes of Sexual Assault*, 1-5 (2000), available at http://www.ccasa.org/documents/Root_Causes_Short_Descriptions.pdf; *Female Sex Offenders*, CENTER FOR SEX OFFENDER MANAGEMENT (March 2007), available at http://www.csom.org/pubs/female_sex_offenders_brief.pdf.

100. Cassia Spohn et al., *The Impact of the Ethnicity and Gender of Defendants on the Decision to Reject or Dismiss Felony Charges*, 25 CRIMINOLOGY 175, 176 (1987).

101. *Id.* (discussing how women generally receive more lenient treatment in the criminal justice system; this finding could be reasonably extended to sex crimes in particular); see e.g., Meagan O’Halloran, *Do Female Sex Offenders Receive a Lighter Punishment Compared to Males?*, WJHG, Jan. 26, 2011, available at <http://www.wjhg.com/home/headlines/114682004.html>.

castration, she would have a much better chance of having her case dismissed or not being convicted than would her male counterpart. "Women's cases are more often dismissed than men's. . . . Cases with a male perpetrator have a higher chance of conviction (50 percent against 37 percent)."¹⁰² This disparity may be a consequence of improper prosecutorial discretion.¹⁰³ "Being less formal, [criminal prosecution] may not require decision makers to follow equally strict procedures. Being less visible, they are by definition less subject to scrutiny by outsiders. Thus, there is greater potential for discrimination at the pre- and post-trial stages than at the convicting and sentencing stages."¹⁰⁴ Similarly, empirical data has demonstrated that women have historically been given favorable treatment in pre-trial criminal proceedings; for instance, women are released on bond more frequently than men.¹⁰⁵ Thus, prosecutorial discretion partially contributes to males being sentenced to chemical castration more frequently than women.

D. The Judiciary: Unfettered Discretion Leads to Sex Disparity at Sentencing

Last, vast judicial discretion in the chemical castration sentencing system provides a breeding ground for discrimination.¹⁰⁶ "[The] lack of [statutory] guidance, in turn, affords a broad range of discretion on the part of . . . the judiciary . . . in the application of chemical castration statutes."¹⁰⁷ Because the chemical castration statutes do not include specific criteria for judges to use in determining which of the eligible offenders to castrate,

102. Bijleveld, *supra* note 94, at 351 (discussing sex offenses committed by females in the Netherlands); *Female Sex Offenders*, CTR. FOR SEX OFFENDER MANAGEMENT (March 2007), available at http://www.csom.org/pubs/female_sex_offenders_brief.pdf.

103. Marc Angelucci, NAT'L COALITION OF FREE MEN, *Males Get Longer Sentences than Females for Same Crime* (2002) (quoting Pradeep Ramanathan, Vice-President of National Coalition of Free Men) ("All the research clearly demonstrates that gender is the most significant biasing factor in determining whether or not someone will be charged, prosecuted, indicted and sentenced, as well as determining the severity of the sentence.") available at <http://www.ncfm.org/libraryfiles/Children/DV/Longer%20Sentences%20than%20Females.pdf>.

104. Spohn, *supra* note 100, at 176.

105. Stuart S. Nagel & Lenore J. Weitzman, *Women as Litigants*, 23 HASTINGS L.J. 171, 176, 180 (1971-1972) (in the context of larceny and assault cases "women are substantially less likely than men to be subjected to jail before or after trial"); see Cecilia Saulters-Tubbs, *Prosecutorial and Judicial Treatment of Female Offenders*, 57 FED. PROBATION 37, 37 (1993).

106. Richeson, *supra* note 18, at 114-15.

107. *Id.*

judges may sentence offenders in a sexually discriminatory manner.¹⁰⁸ Both intentional and unintentional discretionary judicial decisions have surely contributed to the sex disparity in chemical castration sentences.

Sentencing judges may utilize their discretion to intentionally discriminate against male offenders, due to unfounded sex stereotypes that all women offenders are less culpable than their male equivalents or that women are fragile and need protection from harsh sentences.¹⁰⁹ Rarely has intentional sex discrimination manifested itself, on the record, as overtly as when a federal trial judge once said:

Well, these modern philosophies that have come forward lately about women's liberation is such that I reckon legally I can't make a distinction between your sentence and your co-defendants, but I'm old-fashioned enough I just don't believe in punishing women who participate in a crime with the men on the same basis as a man. Ordinarily I think the man takes the lead and persuades the female, the woman. That may not be so; that may be old-fashioned. I'm going to give you the benefit of that although the evidence seems to indicate that might not be the case here. But because of your age and the fact that you are a woman, the Court will not incarcerate you for quite as long as I did your co-defendant.¹¹⁰

It was a fear of this sort of intentional, yet often unspoken, discrimination in sentencing that prompted Congress and many states to create sentencing guidelines such as: "Congress's principal concern in establishing the [United States Sentencing] Commission [was that] unfettered judicial sentencing discretion fostered unwarranted disparity and discrimination, and other unsatisfactory results in the sentencing of individuals."¹¹¹ After the enactment

108. As scholars have argued that discretion can be used in a racially discriminatory manner, this same logic can also be applied in the context of sex discrimination against male offenders. See, e.g., *id.*

109. See Sergio Herzog & Shaul Oreg, *Chivalry and the Moderating Effect of Ambivalent Sexism: Individual Difference in Crime Seriousness Judgments*, 42 LAW & SOC'Y REV. 45, 45-46 (2008).

110. *United States v. Maples*, 501 F.2d 985, 986 (4th Cir. 1974). Because this case involves a Court of Appeals reversing a District Court decision, there is some hope that judicial review can combat judicial bias. However, as explained further below, judicial review will not be a possible check against most sex discrimination because, in many cases, it is not demonstrated so overtly on the record.

111. Ilene H. Nagel & Winthrop M. Swenson, *The Federal Sentencing Guidelines for Corporations: Their Development, Theoretical Underpinnings, and Some Thoughts About Their Future*, 71 WASH. U.L.Q. 205, 212 (1993) (footnote omitted). See also *Federal Sentencing Guidelines: Background, Legal Analysis, and Policy Options*, CONGRES-

of the guidelines, the United States Supreme Court ruled that sentencing guidelines are not mandatory,¹¹² thus leaving the concern over discrimination at sentencing a very real one.

In addition, albeit in a less forthright but equally invidious manner, judicial discretion that is exercised in a good faith effort to accomplish the purposes of sentencing might unintentionally yield sex disparities. This may arise in the chemical castration context since Depo-Provera is only effective at reducing recidivism in men, but not women. Therefore, in the rare instance that a woman is actually before a sentencing judge (after committing and being convicted of one of the enumerated sex crimes), the only reasonable sentence—that is true to the goals of sentencing—would be to not impose chemical castration due to its ineffectiveness on women. To do otherwise would not serve the goals of the chemical castration statutes, thereby making the punishment inappropriate. Thus, the goals would only be furthered when imposed on male offenders. This demonstrates that it is not only the sexist and irrational judicial decisions at sentencing that have contributed to the sex disparity in the chemical castration regime, but also the good faith and well-reasoned efforts to impose a just punishment.

In short, although a sex disparity in the chemical castration sentencing system may have initially resulted from public fervor over lenient sentences for sex offenders, it has become ingrained into the system through the acts of the legislatures (by writing laws that are only capable of being committed by men), criminals (by being principally male), prosecutors (by charging men more frequently than women), and sentencing judges (by intentionally or unintentionally perpetuating sex biases). In conjunction, these actions make the likelihood of a woman being subjected to chemical castration virtually nonexistent.¹¹³ This result cannot stand in a society that finds it inherently unjust to sentence offenders differently because of their sex.¹¹⁴

SIGNAL RESEARCH SERVICE at 12 (2007), available at <http://www.fas.org/sgp/crs/misc/RL32766.pdf>. See Sarah Abramowicz, *Rethinking Parental Incarceration*, 82 U. COLO. L. REV. 793, 825–31 (2011).

112. *United States v. Booker*, 543 U.S. 220, 222 (2005).

113. It is not impossible, in the strict sense of the word, for a similar sentence to be imposed on women; rather, it is very unlikely. For example, the U.S. Supreme Court famously upheld surgical sterilization in *Buck v. Bell*, 274 U.S. 200, 207 (1927). However, the purpose of the law at issue in that case was sterilization; it was not meant to reduce sexual impulses, which is the primary focus of chemical castration legislation. For a more recent account, see *Woman Who Molested Sons Agrees to Sterilization*, N.Y. TIMES (Jan. 31, 1993) ("A woman who was convicted of molesting her sons has agreed to be sterilized to avoid prison, and the judge who gave her the choice has now come under criticism."), available at <http://www.nytimes.com/1993/01/31/us/woman-who-molested-sons-agrees-to-sterilization.html>.

114. See 28 U.S.C. § 994(d) (2010) (requiring "that the guidelines . . . are entirely neutral as to the . . . sex . . . of offenders."). Furthermore, analogously, sentences resulting in

IV. PROPOSALS FOR ELIMINATING OR REDUCING THE SEX DISPARITY PRESENT IN THE CHEMICAL CASTRATION SENTENCING REGIME

The apparent disparity in the current chemical castration regime is the result of an antiquated system that has changed little since California passed the first chemical castration laws in the United States over sixteen years ago.¹¹⁵ We should now seriously reevaluate the desirability of chemical castration laws and choose to either abandon the chemical castration regime absolutely or implement fundamental changes that will overhaul the entire system to reduce the sex disparity.

A. Proposal #1: Declare Chemical Castration Statutes Unconstitutional

A successful constitutional challenge to chemical castration laws would ensure that the sex disparity is eliminated from the sentencing regime by ceasing the practice altogether. Potential claims could be based in the First Amendment's protection of freedom of thought, the Eighth Amendment's prohibition against cruel and unusual punishment, and the Fourteenth Amendment's Due Process and Equal Protection Clauses. While the constitutional claims themselves might not argue that the existence of sex disparity is what makes the laws unconstitutional,¹¹⁶ a successful claim would still achieve the desired end: elimination of the sex disparity.

It seems unlikely, however, that courts would be willing to declare the chemical castration statutes outright unconstitutional—in many cases, courts have either denied the constitutional claims or decided the cases on other grounds.¹¹⁷ However, avoiding the constitutional questions and decid-

racially disparate effects have been a point of public outrage, particularly laws creating the 100:1 crack cocaine/powder cocaine sentencing disparity, which have been eliminated by Congress. See Fair Sentencing Act of 2010, 21 U.S.C. 801 (2010); see generally, Phillip Smith, *Drug Policy Prospects on Capitol Hill This Year*, STOPTHEDRUGWAR.ORG (Sept. 14, 2011) <http://stopthedrugwar.org/taxonomy/term/112>; see also *Kimbrough v. United States*, 552 U.S. 85 *passim* (2007).

115. Audrey Moog, *California Penal Code Section 645: Legislators Practice Medicine on Child Molesters*, 15 J. CONTEMP. HEALTH L. & POL'Y 711, 733 (1999). See also CAL. PENAL CODE § 645 (West, Westlaw through 2012). A legislative history of the bill can be found by visiting <http://www.leginfo.ca.gov>.

116. As demonstrated in Section IV(a), courts often uphold statutes that treat men and women differently.

117. See, e.g., *Savery v. Dep't of Corr.*, No. 6:09-cv-810-Orl-31DAB, 2010 WL 4683773, at *6, (M.D. Fla. Nov. 10, 2010) (dismissing the claim for failure to "raise the issue . . . at sentencing or on direct appeal" even though "[n]o published Florida cases discuss the constitutionality or legality of" the state's chemical castration statute); *Am. Civil Liberties Union of Ark. v. State*, 5 S.W.3d 418, 421 (Ark. 1999) ("Because we hold that the trial court properly concluded that the ACLU lacked

ing the cases on alternative grounds¹¹⁸ leaves the possibility of judicial intervention open in some jurisdictions.

Although challenges under the First¹¹⁹ and Eighth Amendments¹²⁰ are possible, the Fourteenth Amendment's Due Process and Equal Protection

standing to intervene in Mr. Stanley's criminal case, we do not reach the merits of the ACLU's underlying claim that castration as punishment for crime violates the United States and Arkansas Constitutions and is not authorized by Arkansas law."); *People v. Foster*, 124 Cal. Rptr. 2d 22, 23 (Cal. Ct. App. 2002) ("Foster contends the portion of the judgment imposing hormone suppression treatment must be reversed because this sentence is grossly disproportionate and violates state and federal constitutional prohibitions against cruel and unusual punishment. Because appellate review of this claim is precluded under the terms of Foster's negotiated plea agreement, we affirm the judgment."); *Houston v. State*, 852 So. 2d 425, 428 n. 2 (Fla. Dist. Ct. App. 5th 2003) ("In view of the mootness of the issue, we offer no opinion on the constitutionality of" the chemical castration statute).

118. *E.g.*, *People v. Gauntlett*, 352 N.W.2d 310, 314 (Mich. Ct. App. 1984) ("It is elementary that appellate courts will not decide constitutional questions when the issue raised can be decided on alternative, nonconstitutional grounds raised in the appeal.").
119. The First Amendment provides that "Congress shall make no law . . . abridging the freedom of speech." U.S. CONST. amend. I. One scholar argued that this constitutional protection could act as a basis for declaring chemical castration laws unconstitutional, as a result of the psychological effects of the drug used: "Indeed, control over one's own reason is a freedom that remains beyond the pale of the state – 'it is wholly inconsistent with the philosophy of the [F]irst [A]mendment to grant government the power to control a person's thoughts, including loathsome, noxious, and immoral thoughts.' At the core, the First Amendment thus protects the right to receive and generate ideas. Chemical castration, nonetheless, directly targets the thought-creation process by 'inhibiting the release of the follicle-stimulating hormone and the lutenizing hormone from the anterior pituitary gland in the brain.' The primary virtue and vice of chemical castration thus lies in its ability to control and 'shackle' the mind of the sexual offender. . . . Granted, the intrusion upon this interest must be balanced against the state's interests, namely the interest in protecting its citizenry from sexual abuse and victimization. Nevertheless, the procedure is not the least restrictive means of achieving any avowed state interest." Richeson, *supra* note 18, at 124–25. Although this presents a unique and clever argument, it is not one that the Court is likely to adopt – especially when other grounds are available for deciding the constitutionality of chemical castration laws.
120. The Eighth Amendment limits the government's discretion in sentencing when it proclaims, "cruel and unusual punishments [shall not be] inflicted." U.S. CONST. amend. VIII. The concept of "cruel and unusual" is meant to change with time and to reflect society's current standards of decency. *Gregg v. Georgia*, 428 U.S. 153, 173 (1977). "In determining whether a punishment violates the Eighth Amendment, courts ask three questions: (1) whether the punishment is inherently cruel or excessive; (2) whether the punishment is proportional to the crime; and (3) whether the state could achieve its goal through less intrusive means." Carlson, *supra* note 21, at 3. As a result of the burgeoning popularity of chemical castration in the United States and abroad, it is unlikely that the Court would declare chemical castration laws as unconstitutionally cruel and unusual. *See* Part III. It seems that society has

Clauses likely provide the strongest bases for challenging the constitutionality of chemical castration laws. However, because constitutional claims have already been discussed by scholars and have proved unsuccessful in court, this Note will only provide a brief overview of the Fourteenth Amendment claims.

1. The Fourteenth Amendment: Equal Protection¹²¹

Although the chemical castration laws are often drafted in a facially neutral manner, they may violate the Equal Protection Clause as a result of how the chemical affects men and women differently. Several courts have already addressed facial discrimination challenges to chemical castration laws under the Equal Protection Clause without success,¹²² but an “as applied” discrimination claim might still be viable. Although, as discussed above, it is highly unlikely for a woman to actually be sentenced to chemical castration, a woman so sentenced would need to argue that the different effects that Depo-Provera, the drug used for chemical castration, has on men and women violates her constitutional rights.¹²³ This argument would be based in the fact that the drug only sterilizes female offenders but not males, and only reduces the sexual urges of male offenders but not fe-

begun to accept these sorts of chemical injections as a part of everyday life. Some scholars have even argued that chemical castration is not a punishment at all, but rather, is more like a medical treatment for the mentally ill, and thus not subject to the Eighth Amendment’s limitations. Russell, *supra* note 1, at 456. However, although surgical castration can be used as a medical treatment in rare instances, in general, prisoners will be castrated for the purposes of protecting society and signifying the reprehensibility of the perpetrator’s actions rather than as a means of providing the criminal with medical aid. Stinneford, *supra* note 12, at 599. For these reasons, castration is generally viewed as a “punishment,” not a “treatment.” Edward A. Fitzgerald, *Chemical Castration: MPA Treatment of the Sexual Offender*, 18 AM. J. CRIM. L. 1, 32–39 (1990) (discussing the tests that have been used by courts to determine whether an something constitutes treatment or punishment); Lombardo, *supra* note 20, at 2617 (arguing that the procedure would not violate the Eighth Amendment’s prohibition against cruel and unusual punishment if it was characterized as treatment instead of punishment).

121. The Equal Protection Clause of the Fourteenth Amendment provides that “[n]o State shall make or enforce any law which shall . . . deny to any person within its jurisdiction the equal protection of the laws.” U.S. CONST. amend. XIV, § 1.

122. In *Michael M. v. Superior Court*, the Court ruled that a state’s facially discriminatory rape statute could withstand an Equal Protection claim due to the strong state interest. *Michael M. v. Superior Court of Sonoma County*, 450 U.S. 464, 471–74 (1981).

123. Beckman, *supra* note 23, at 867.

males.¹²⁴ This difference could be the basis for declaring the statutes unconstitutional.

The Equal Protection Clause does not require a state to treat all individuals, including those individuals belonging to a specified class, identically – in fact a state may permissibly classify its citizens and treat them differently, but only when the classifications and unequal treatment are related to a legitimate state interest.¹²⁵ The state's interest in reducing recidivism in sexual offenders and protecting its citizens is readily apparent in the chemical castration statutes.¹²⁶ The interest in reducing recidivism is not achieved, however, when women are sentenced to chemical castration.¹²⁷ Therefore, a challenge under Fourteenth Amendment Equal Protection may be viable grounds for declaring a chemical castration statute unconstitutional.

2. The Fourteenth Amendment: Substantive Due Process¹²⁸

A substantive due process challenge is likely the best basis for declaring chemical castration laws unconstitutional. The substantive due process clause has been interpreted by the Supreme Court as providing citizens with certain substantive protections, such as barring the state from interfering with their right to procreate.¹²⁹ Therefore, a challenge to the chemical castration laws would need to assert that the drug used for chemical castration interferes with women's' right to procreation.¹³⁰

Chemical castration laws undeniably interfere with women's' right to procreate because Depo-Provera sterilizes women.¹³¹ While the state may permissibly interfere with such a fundamental right if it can prove that its law is narrowly-tailored and serves a compelling state interest,¹³² there is no

124. See Note, *Constitutional Law—Due Process and Equal Protection—California Becomes First State to Require Chemical Castration of Certain Sex Offenders*, *supra* note 32, at 800.

125. Beckman, *supra* note 23, at 866.

126. *Id.* at 867.

127. *Id.*

128. The Due Process Clause of the Fourteenth Amendment provides that "[n]o State shall . . . deprive any person of life, liberty, or property, without due process of law." U.S. CONST. amend. XIV, § 1.

129. Beckman, *supra* note 23, at 873–75. See also *Skinner v. Oklahoma*, 316 U.S. 535, 541–42 (1942).

130. Beckman, *supra* note 23, at 874–77.

131. In women, it acts as a 99% effective birth control. *Id.* at 857. Even after the chemical castration injections have ceased, women may remain infertile for up to eighteen months. *Id.* However, when the drug is used to chemically castrate males, it does not cause impotence nor does it prevent them from engaging in sexual activity. *Id.* at 875. Its side effects also wear off in a matter of weeks, instead of months, for male offenders. *Id.*

132. *Skinner*, 316 U.S. at 540.

such interest when the state sentences a woman to chemical castration.¹³³ Therefore, if a woman were to be sentenced to chemical castration, the state would be impermissibly interfering with her fundamental right to procreation and would fail to justify such interference with a legitimate state interest. Thus, it may be possible to declare the statutes unconstitutional through a substantive due process challenge, thereby completely eliminating the practice and the sex disparity along with it.

B. Proposal #2: Encourage Sentencing Judges to Refrain from Sentencing Any Convict to Chemical Castration

Judges should refuse to impose chemical castration sentences on all offenders because they have a duty to impose just sentences that further the goals of sentencing.¹³⁴ This proposal is simple: in all cases where a sex offender is up for sentencing the judge should refuse to impose chemical castration—no matter the sex of the offender or the offense committed, and regardless of whether it is a statutorily available option. To this end, judges could, in their own capacity, effectuate an absolute bar against the use of chemical castration sentences.

1. Refusal Based on Sentencing Guidelines

Judges should refuse to impose chemical castration in all cases because such sentences do not comport with the requirement of sex neutrality under state and federal sentencing guidelines. The Federal Sentencing Guidelines, which have been adopted in one form or another by many states, say that it is the responsibility of the Sentencing Commission to “assure that the guidelines . . . are entirely neutral as to the . . . sex . . . of offenders.”¹³⁵ Additionally, section 5H1.10 says that an offender’s sex is “not relevant in

133. The purported purposes for sentencing an offender to chemical castration are “rehabilitation, deterrence, and public safety.” Beckman, *supra* note 23, at 874. Yet none of these are accomplished when women are sentenced to chemical castration because “there is no evidence that [chemical castration] decreases the female sex drive.” *Id.*

134. Ryan W. Scott, *Inter-Judge Sentencing Disparity After Booker: A First Look*, 63 STAN. L. REV. 1, 42 (2010); Kimbrough v. United States, 552 U.S. 85, 96 (2007) (discussing District Court’s obligation to impose sentences that “accomplish the goals of sentencing”); United States v. Booker, 543 U.S. 220, 260 (2005) (“[T]he Act nonetheless requires judges to impose sentences that reflect the seriousness of the offense, promote respect for the law, provide just punishment.”).

135. 28 U.S.C. § 994(d) (2010). *See also Federal Sentencing Guidelines: Background, Legal Analysis, and Policy Options*, CONGRESSIONAL RESEARCH SERVICE at 12 (2007), available at <http://www.fas.org/sgp/crs/misc/RL32766.pdf>. *See* Sarah Abramowicz, *Rethinking Parental Incarceration*, 82 U. COLO. L. REV. 793, 825–31 (2011).

the determination of a sentence."¹³⁶ By the same token, at sentencing, the court is directed to consider "the need to avoid unwarranted sentence disparities among defendants with similar records who have been found guilty of similar conduct."¹³⁷

Therefore, the offender's sex should never be relevant to the sentence that the judge chooses to impose in a particular case.¹³⁸ Instead, the judge should impose similar sentences on both men and women who commit similar offenses. The only way to achieve this objective would be to subject either all or none of the eligible offenders to chemical castration. Solely imposing chemical castration on one sex would violate the sentencing guidelines.¹³⁹ As a result, the best way to ensure that men and women are sentenced equally and in line with the sentencing guidelines is for sentencing judges to never impose chemical castration sentences.

2. Refusal Based on Public Policy

Even if a judge believes that it would not violate the Constitution or Sentencing Guidelines to impose a sentence of chemical castration, there are numerous public policy reasons to refuse to do so. In *Kimbrough v. United States*, the Supreme Court held that it was within a judge's discretion to refuse to impose a sentence when he or she fundamentally disagrees with its underlying policy, even though that sentence has been approved by the legislature.¹⁴⁰ The Court said a judge is only required by statute to "impose a

136. UNITED STATES SENTENCING COMMISSION, FEDERAL SENTENCING GUIDELINES MANUAL § 5H1.10 (2011).

137. 28 U.S.C. § 994(d); *see also* 18 U.S.C. § 3553(a)(6) (2010); UNITED STATES SENTENCING COMMISSION, *supra* note 136, § 5H ("This Part addresses the relevance of certain specific offender characteristics in sentencing. The Sentencing Reform Act (the 'Act') contains several provisions regarding specific offender characteristics: First, the Act directs the Commission to ensure that the guidelines and policy statements 'are entirely neutral' as to five characteristics—race, sex, national origin, creed, and socioeconomic status.").

138. Empirical studies show that there is, in fact, a sex disparity, despite the statutory prohibition against judges considering the offender's sex. David B. Mustard, *Racial, Ethnic and Gender Disparities in Sentencing: Evidence from the U.S. Federal Courts*, 44 J.L. & ECON. 285, 311 (2001) ("[A]fter including more exhaustive controls than any previous study, large differences in the length of sentence exist on the basis of race, gender, education, income, and citizenship. These disparities occur in spite of explicit statements in the guidelines that these characteristics should not affect the sentence length.").

139. Because imposing the sentence on female offenders would not achieve the goals of sentencing, it would seem unfair to subject all of them to chemical castration purely out of a desire to impose the sentence on male offenders as well.

140. *Kimbrough v. United States*, 552 U.S. 85, 98 (2007) ("[D]istrict courts may vary from the Guidelines based on a reasoned disagreement with . . . policy.").

sentence sufficient, but not greater than necessary” to accomplish the goals of sentencing.¹⁴¹ The Court held that the judge need not choose a sentence that is prescribed by the statute.¹⁴² Therefore, if judges are adequately persuaded by public policy considerations, their refusal to impose chemical castration is unlikely to be reversed, even though the convict is eligible for the sentence under the statute.

There are three public policy reasons for why judges should refuse to impose chemical castration. First and most importantly, judges should refuse to reserve an invasive and degrading form of punishment for only one class of citizens. Chemical castration involves weekly injections of a chemical which alters the physiology and psychology of a convict¹⁴³—so much so, in fact, that the practice has been likened to the Nazis’ experimentation on prisoners¹⁴⁴ and to animal testing.¹⁴⁵ It also carries a similar stigma as surgical castration—rather than an actual loss of manhood or womanhood, there is a symbolic loss.¹⁴⁶ Applying such a punishment to only one class of people should not be socially acceptable.

Second, judges should refuse to impose a sentence that reinforces stereotypes of men and women. The mere fact that some chemical castration statutes are written in a sex neutral manner does not mean that they are free of harmful sex biases.¹⁴⁷ It is up to judges to stop perpetuating these antiquated notions of sexism as applied to the chemical castration context. “Traditionally, women have benefited from the paternalism and chivalry of a largely male judiciary [and women] often receive lesser sentences because men believe they need protection and help.”¹⁴⁸ These concepts act as a barrier to sex equality and thus are more detrimental than beneficial.¹⁴⁹ By imposing different standards for sentencing men and women to chemical castration, judges are, in effect, perpetuating these archaic stereotypes by protecting women from the harshness of chemical castration.¹⁵⁰ Judges should avoid such chivalric and paternalistic actions, which have been criti-

141. *Id.* at 101.

142. *Id.*

143. Lombardo, *supra* note 20 at 2644; Stinneford, *supra* note 12 at 597–99.

144. Russell, *supra* note 37, at 440.

145. Richeson, *supra* note 18, at 125.

146. *Id.* at 122.

147. Myrna S. Raeder, *Gender and Sentencing: Single Moms, Battered Women, and Other Sex-Based Anomalies in the Gender-Free World of the Federal Sentencing Guidelines*, 20 PEPP. L. REV. 905, 921 (1993).

148. Demleiter et al., *supra* note 40.

149. David P. Bryden, *Redefining Rape*, 3 BUFF. CRIM. L. REV. 317, 432 (2000).

150. See, e.g., Christopher M. Alexander, *Crushing Equality: Gender Equal Sentencing in America*, 6 AM. U. J. GENDER & L. 199, 218 (“[W]omen received preferential treatment in sentencing, based either to notions of paternalism toward women. . . or to the idea that judges perceived women as less violent than male offenders.”).

cized by feminist scholars in other areas of criminal law, by refusing to impose chemical castration in all situations.¹⁵¹

Third, judges should refuse to impose a chemical castration on top of a full prison sentence,¹⁵² because doing so adds costs – in the form of taxes – to the already overburdened penal system.¹⁵³ These costs could be increased to an even greater extent when, as proposed by some scholars, convicts are also provided psychiatric counseling in conjunction with the chemical castration sentence.¹⁵⁴ It is unlikely that the public will readily accept the idea of paying more money to help rehabilitate offenders, rather than merely locking them up in prison for less.¹⁵⁵ Therefore, as a matter of public policy, judges should refuse to sentence any offender to chemical castration.

C. Proposal #3: Suggestions for Reducing the Sex Disparity in the Current Chemical Castration Sentencing Regime

Because there are many proponents of chemical castration, it may be more desirable to reduce the sex disparity through structural reforms than to abandon the practice altogether. These reforms would not absolutely guarantee elimination of the sex disparity in chemical castration sentences, but would likely curb the negative aspects of the current sentencing regime.

Blame for the faults of the chemical castration regime cannot easily be cast on any individual branch of government:

Historically, the executive, legislative, and judicial branches have shared responsibility for setting sentences for offenders convicted of federal crimes. The executive branch traditionally influences sentencing primarily through its authority to initiate prosecution, select appropriate charges, and enter into plea agreements. Congress influences sentencing by defining criminal conduct and by establishing the range of possible penalties for violations of criminal law. The judiciary influences sentencing by selecting sentences for convicted offenders from within the congressionally prescribed statutory ranges.¹⁵⁶

151. Comment, *Annotated Legal Bibliography on Gender*, 15 CARDOZO J.L. & GENDER 383, 417 (2009).

152. If chemical castration sentences were provided in lieu of full prison sentences (*i.e.*, resulted in a reduction in a term of years), it is possible that the costs of chemical castration could be less than, or equivalent to, solely imprisonment.

153. Russell, *supra* note 37, at 428.

154. Beckman, *supra* note 23, at 861–63.

155. See Part III(a) (discussing prison overcrowding).

156. Nagel & Swenson, *supra* note 111, at 205.

The actions of each branch of government have contributed to the problem.¹⁵⁷ Therefore, this Note provides a suggestion for each branch that will reduce the sex disparity that they have created.

1. The Legislative Branch

The legislative branch could reduce sex disparity in the chemical castration sentences by amending the statutes so that the punishment could only be imposed after the convict has voluntarily agreed to undergo the weekly injections. By prohibiting mandatory chemical castration, any residual sex disparity would be the result of the individual criminal convicts themselves, instead of structural biases created by the government. Although this may not reduce the sex disparity in fact, it is a better alternative than having the disparity result from governmental action.¹⁵⁸

It is unlikely that convicts will "voluntarily" opt for chemical castration over a prison sentence, even though voluntariness is constitutionally required for consent.¹⁵⁹ The argument is that a convict will feel compelled to choose chemical castration because it is so much more desirable than prison.¹⁶⁰ This issue would arise, for example, if a convict were given the choice between (1) freedom to do what he pleases and reintegration back into normal society (subject only to the condition that he receives weekly chemical injections) versus (2) serving a prison sentence of twenty years. Such choices are so unequal that the only rational option would be to choose the former, and thus the offer effectively compels the convict to choose that option. However, this is only true if the options presented to the convicts are not roughly equivalent. If, instead, the convict is given fairly equivalent sentencing options the choice can be said to be the product of free will, and thus voluntary.¹⁶¹ An example of equal options might involve a choice between a reduced sentence, in conjunction with receiving chemical castration treatment, versus the full prison term.¹⁶² This precise balance, however, is best left up to the legislature.¹⁶³

157. See Part IV.

158. As an additional benefit, some scholars have argued that voluntary compliance and participation results in a decrease in recidivism rates among chemical castration sentences. Beckman, *supra* note 23, at 861–63.

159. Spalding, *supra* note 22, at 136–37.

160. Richeson, *supra* note 18, at 114.

161. *Id.*

162. *Id.*

163. See, e.g., *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 865 (1984) ("Such policy arguments are more properly addressed to legislators or administrators, not to judges.").

2. The Judicial Branch

The judicial branch could help reduce the sex disparity in chemical castration sentences, particularly in bifurcated trials (where one judge/jury finds guilt and a different judge decides the sentence to impose), by requiring all presentence reports to be written in a sex-neutral manner. Without knowledge of the offender's sex, judges will not be influenced by intentional or subconscious stereotypes that have led to chivalric and paternalistic sentencing in the past; instead, the judge's decision would be based solely on the sex-neutral facts of the case. This would be the optimal condition for judges to choose whether or not to impose chemical castration in a particular case. Although it is true that all judges eventually see the convict at sentencing, the goal is to not bias the sentencing judge's initial impression.

3. The Executive Branch

The executive branch could reduce the sex disparity present in the chemical castration regime by advocating for such a sentence only after determining that the convict would, in fact, benefit from the chemical injections. This could be achieved by requiring the prosecutor to prove, as an element of the sentencing decision, that the convict suffers from "paraphilia" (as determined by a legitimate psychological analysis).¹⁶⁴ Paraphilia is a psychiatric disorder manifested by "recurrent, intense sexually arousing fantasies, sexual urges, or behaviors . . . that occur over a period of at least 6 months."¹⁶⁵ Chemical castration is the most effective treatment when imposed on convicts suffering from this mental illness; the mere fact that someone commits a sex crime, however, does not necessarily imply that he or she suffers from paraphilia or that he or she would benefit from the treatment.¹⁶⁶ Chemical castration laws that apply to all sex criminals, with-

164. "Paraphilics suffer from overwhelming sexual desires resulting in an impaired ability for socially acceptable means of sexual gratification." Beckman, *supra* note 23, at 428.

165. DIAGNOSTIC AND STATISTICAL MANUAL OF MENTAL DISORDERS, 565 (American Psychiatric Association, 4th ed. 2000).

166. J. Paul Federoff et al., *A Case Series of Women Evaluated for Paraphilic Sexual Disorders*, 8 CAN. J. HUM. SEXUALITY 127, 127 (1999). Even though chemical castration "does provide the most effective treatment for rehabilitating some paraphilic offenders . . . it is not a blanket treatment appropriate for all sexual criminals or even all paraphilics." Beckman, *supra* note 23, at 860–61. A punishment will only have a deterrent effect on potential offenders who are capable of rationally weighing the costs and benefits of committing a crime, before actually doing so. Carlson, *supra* note 21, at 29. This is likely not true in the sex crime context, since most such offenders suffer from a psychological disorder called paraphilia. See Dawn J. Post, *Preventative Victimization: Assessing Future Dangerousness in Sexual Predators for Pur-*

out regard to whether the offender has been diagnosed with paraphilia or would be receptive to the treatment, are "ineffective in accomplishing the state's goal of rehabilitation."¹⁶⁷ This is particularly true when non-paraphilics¹⁶⁸ and females¹⁶⁹ commit sex crimes because chemical castration does nothing to eradicate whatever caused them to commit the sex act in the first place. Therefore, proof of this disease should be a prerequisite to imposing a sentence, and the burden should fall on the prosecutor.

It has been shown that paraphilia is a largely male-dominated mental illness,¹⁷⁰ and thus, having a psychological analysis as a prerequisite to imposing a chemical castration sentence may yield little or no reduction in sex disparity. The Supreme Court has recognized that sentences will not necessarily reflect the demographics of society; however, these differences are only permissible when the disparity is the result of legitimate biological differences.¹⁷¹ Therefore, even if this reform does not reduce the sentencing disparity in fact, it will ensure that the resulting disparity is based on actual

poses of Indeterminate Civil Commitment, 21 HAMLINE J. PUB. L. & POL'Y 177, 241 (1999) (explaining one study that found "the great majority of sex offenders had multiple paraphilias and were involved in substantial criminal behavior").

167. Beckman, *supra* note 23, at 874.

168. Examples of non-paraphilics who commit sex crimes include "offenders [who] are simply opportunistic criminals, [those who] are suffering from major [non-paraphiliac] mental disorders, [those who] act while intoxicated and many [who] are a combination of the foregoing." Fedoroff et al., *supra* note 106. Therefore, using chemical castration on an indiscriminatory basis is necessarily over-inclusive: many convicts will be sentenced to chemical castration even though the drug does not achieve any incapacitating effect on those individuals. "Chemical castration thus proves ineffective in reducing recidivism amongst sex offenders whose sexual urges are motivated by internal feelings of anger, violence, domination, or power. With this category of offenders, impotence simply forces them to find some other instrument or weapon that they can utilize to violate and assault their victims." Richeson, *supra* note 18, at 127.

169. There is "widespread acceptance in sexology that paraphilias in women are rare to nonexistent." Fedoroff et al., *supra* note 106. The incidence of female paraphilia is so low, in fact, that the American Psychiatric Association's Diagnostic and Statistical Manual of Mental Disorders (DSM), the foremost authority on the classification of mental disorders, describes two of the nine subcategories of paraphilia in the masculine pronoun. The nine subcategories of paraphilia include exhibitionism (exposure of genitals), fetishism (use of nonliving objects), frotteurism (touching and rubbing against a non-consenting person), pedophilia (focus on prepubescent children), sexual masochism (receiving humiliation or suffering), sexual sadism (inflicting humiliation or suffering), transvestic fetishism (cross-dressing as a member of the other sex), voyeurism (observing sexual activity), and paraphilia not otherwise specified. *Id.* Therefore, since women are less likely to suffer from a mental illness that drives people to commit sex crimes, the threshold requirement for imposing chemical castration is significantly biased against males.

170. Fedoroff et al., *supra* note 106.

171. *Michael M. v. Superior Court of Sonoma Cnty.*, 450 U.S. 464 (1981).

biological differences between men and women, and not unfounded sex stereotypes.

CONCLUSION

Chemical castration has rapidly gained popularity due to its purported ability to cure society of one of its most forsaken ills. Yet, no matter how admirable and desirable these goals were at first, they have been pursued without taking the time to look at potential drawbacks and harms they may create. One of the most unsettling problems is the sex disparity that results from the inherently biased structure of the chemical castration sentencing regime.

Society should take the time now to reconsider its objectives and carefully construct a plan for achieving them. This may involve completely abandoning the use of chemical castration or may require implementation of drastic but realistic changes in the chemical castration sentencing process. These are the only ways to ensure that convicts receive just punishments, free of sex biases. ♣

